

funds, whatsoever. (SBH Ex. 6, p. 2) Secondly, although Bryan's total estimated costs of construction and initial operation of \$ 175,000.00 may have exceeded those costs that he listed in his Itemization of Costs (SBH Ex. 15) by \$ 38,517.12, that differential did not constitute any "surplus." On the contrary Bryan admitted that he included in the \$ 175,000.00 total the engineering and legal costs of prosecuting his application, among other items not listed in his Itemization of Costs. (SBH Ex. 6, p. 2) (See: SBH's Proposed Findings at paras. 2, 125)

41. Bryan's reliance (at para. 35) on the Commission's 1981 Revision of Form 301 is misplaced. The language cited by Bryan in this regard goes solely to the lack of any requirement that any "stingent itemization" be set forth in the application. It does not obviate the requirements that an applicant first must determine what kind of station it is proposing to construct (including developing a reasonable technical proposal, capable of being effectuated) and then to ascertain the costs of implementing that proposal for a period of three months without revenue. Nor does it obviate the requirement that an applicant have documentation on hand at the time it certifies and files its application, verifying its cost estimates and sources of funding. Northampton Media Associates 4 FCC Rcd 5517, 5519 (1989), aff'd. 941 F. 2d 1214 (D.C. Cir. 1991)

42. Bryan's cites Baltimore Radio Show, 4 FCC Rcd 6437 (RB 1989) for the proposition that a detailed written budget is not required. However, in that case the Board, in reliance upon

Northampton Media Associates 4 FCC Rcd 5517 (1989) appropriately ruled that contemporaneous written documentation of financial qualifications was not required of pre-June, 1989 applicants. Id. at 6443 (para. 27). Unlike the applicant in Baltimore Radio Show, Bryan filed his application utilizing the June, 1989 version of FCC Form 301 and, accordingly, was required to have documentation supporting his financial certification on hand at the time he filed. Furthermore, unlike the instant case, there was no evidence that the procedures utilized by the applicant in Baltimore Radio Show had resulted in any serious understatement or omission of construction and initial operating costs.

43. Bryan argues (at para. 29) that the record establishes that all of the factors discussed in Scioto Broadcasters, 5 FCC Rcd. 5158 (RB 1990) are met by the December 12, 1991 letter Bryan obtained from the Greene County Bank. However, Bryan's argument is unpersuasive, inasmuch as Scioto Broadcasters addressed the pre-1989 financial qualifications standard, while Bryan filed his Application utilizing the June, 1989 edition of FCC Form 301 and, thus, was required also to meet the documentation requirements adopted by the Commission in 1989 in order to demonstrate his financial qualifications. Northampton Media Associates 4 FCC Rcd 5517, 5519 (1989) Furthermore, the December 12, 1991 bank letter does not even meet the Scioto Broadcasters test, given its silence as to the proposed terms of repayment and special conditions (e.g., moratorium on interest payments) and its vagueness with regard to collateral requirements, which precluded

Bryan, as "the borrower" from being "fully familiar with, and accepts the terms and conditions of the proposed loan (e.g. payment period, interest rate, collateral requirements and other basic terms)." Scioto Broadcasters, at 5160 (para. 12). Finally, the factors identified in Scioto Broadcasters represented "ordinary fundamentals," "short of" which "it would be difficult to infer 'reasonable assurance' from a 'committed source.'" Thus, while the absence of the fundamental factors identified in Scioto Broadcasters will preclude a finding of reasonable assurance, their presence will not necessarily establish the existence reasonable assurance.

44. Bryan argues (at para. 29) that "this is not a case where the bank letter is standing alone." However, while Bryan may rely upon Mr. Puckett's 1994 testimony to establish the current availability of the proposed loan, he may not rely on that testimony to establish the availability of the loan at the time he certified and filed his Application. On the contrary, as of January 9, 1992 the Bank letter was indeed "standing alone, inasmuch as Bryan had no other documentation demonstrating the availability of any funds. (SBH Ex. 6, p. 10, 24) Thus, in order to establish the availability of a \$ 175,000.00 loan commitment as of January 9, 1992, all Bryan has to rely upon is the Bank's December 12, 1991 letter, which is insufficient to meet the Commission's documentation requirements. (See: SBH's Proposed Findings at paras. 85-97) Furthermore, even the 1994 testimony of Puckett is insufficient to meet those requirements, inasmuch

as it, like the December 12, 1991 letter, omits any indication regarding when repayment of the loan is to commence. (Bryan Ex. 6)

45. Bryan's reliance on Northampton Media Associates 4 FCC Rcd 5517 (1989) is misplaced. In that case the Commission explicitly distinguished pre- from post-June, 1989 applications and the documentation requirements attending the latter:

Under the revised form, a broadcast applicant need not submit the underlying documentation to verify its cost estimates and funding sources at the time of certification, but it must actually have such documentation on hand when it submits its application. Northampton Media Associates, at 5519 (para 18).

Here, Bryan did not have sufficient documentation to verify either his cost estimates or his funding source on hand at the time he filed his Application. Accordingly, he cannot be found to have been financially qualified at the time he so certified.

46. Finally, Bryan argues (at para. 37) that the question to be resolved under the false certification issue is whether he made deliberate misrepresentations regarding his financial qualifications. However, the Commission need not make a finding of deliberate misrepresentation to conclude that Bryan falsely and improperly certified his financial qualifications. The Instructions to Section III of FCC Form 301, June, 1989 edition, make it clear that, unless an applicant has in its possession the required documentation, demonstrating its financial qualifications, it cannot properly certify its qualifications. Here the record establishes that Bryan did not have the required

documentation on hand. (See: SBH's Proposed Findings, at paras. 128) Accordingly, it may be concluded that Bryan falsely certified his financial qualifications.

### III. Summary.

47. Bryan's Proposed Findings and Conclusions may not be relied upon, inasmuch as they ignore relevant evidence and, most importantly, ignore the Commission's current financial certification requirements, which require contemporaneous documentation on hand at the time of filing verify the applicant's cost estimates and funding sources. As reflected in SBH's Proposed Findings and Conclusions (at paras. 81-97), Bryan has failed to meet his burden of meeting the Commission's documentation requirements. Furthermore, he significantly understated his costs of construction and initial operation by: (a) relying on used equipment, (b) omitting operating costs, <sup>7</sup>/ (c) omitting equipment and related items, <sup>8</sup>/ (d) omitting the cost of purchasing his transmitter site, (e) underestimating the legal and engineering costs of prosecution, (f) failing to budget for a intermediate receive/transmit point for his proposed

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7. Including: debt service and electric service during the construction period and first month of operation and telephone service for the first month. (See: SBH's Proposed Findings at paras. 24-27)

8. Including: an FM Modulation Monitor, RF Amplifier, second Parareflector antenna, connectors for his STL transmission line, mounting and grounding hardware for both the main and STL transmission lines, monitoring speakers for his studio, equipment and gas to pressurize his transmission line, lightning rods and side lighting for his tower, fencing for the tower, sales tax and freight. (See: SBH's Proposed Findings at paras. 12-13, 42-43, 46-48, 69-70)

microwave STL system, and (g) failing to secure a documented commitment to cover any shortfall resulting from the sale of WSMG. (See: SBH's Proposed Findings at paras. 8, 21, 23, 46-48, 52-57, 63-65) He also understated his costs by relying on his ability to use equipment on hand, but of uncertain availability, including: a Kubota emergency generator, office furniture, telephone equipment, a vehicle and production equipment. (See: SBH's Proposed Findings at paras. 14-19) If all of the costs of implementing Bryan's proposal (as opposed to a hypothetical station) are included, the total would exceed \$ 193,000.00, not including: sales taxes and freight or shipping charges; the cost of replacing any equipment on hand that he proposes to use, the availability of which he has failed to demonstrate; legal and engineering prosecution costs; or the cost of meeting any shortfall in the proceeds of the sale of WSMG. (See: SBH's Proposed Findings at paras. 124-25) Accordingly, even if Bryan had met the Commission's documentation requirements, his available funds would be insufficient to meet his actual costs of implementing his proposal. Accordingly, Bryan was not financially qualified when he so certified nor is he today.

Respectfully Submitted

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October 17, 1994


CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 17th day of October, 1994, served a copy of the foregoing Reply to Proposed Findings of Darrell Bryan on Financial Issues by First Class mail, postage prepaid, except as otherwise noted, upon the following:

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